Supreme Court, U.S.
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NO. 92-438

In The Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

against,

CHARLES BROWN and JAMES WHITE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF CLARENCE WHITE, DECEASED

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

(Respondent White's Version)

1. Whether, since the district court expressly stated that it was remanding the civilian cases because of absence of subject matter jurisdiction, thus remanding pursuant to 28 U.S.C. 1447(c), appellate review in any form - by mandamus, as a Cohen collateral order, or by way of interlocutory appeal under 28 U.S.C. 1292(b) - is absolutely precluded by 28 U.S.C 1447(d).

2. Whether, even if remand had not been made pursuant to 1447(c) and appellate review was potentially possible, the only potential means of review would be by way of mandamus.

3. Whether, even if remand had not been made pursuant to 1447(c) and appellate review was potentially possible by way of mandamus, such review would be

wholly inappropriate because the presence of subject matter jurisdiction under 28 U.S.C. 1442(a)(1) is not "clear and indisputable" and, on the contrary, in the most favorable light for Petitioners is, at best, as the District Court noted, a "close question".

4. Whether, even if remand had not been made pursuant to 1447(c), mandamus was not the only means of review, and appellate review by way of a 1292(b) interlocutory appeal would be potentially possible, such review of any kind in this Court would be appropriate in light of the fact that the Court of Appeals exercised its unassailable discretion to decline such appeal.

5. Whether, even if remand had not been made pursuant to 1447(c) and even if mandamus was not the only means of review, and appellate review was potentially possible as a Cohen collateral order, the

dismissal by the Court of Appeals of the Petitioners' attempted Cohen appeal was correct because the question of jurisdiction in this case involves "considerations that are enmeshed in the factual and legal issues comprising the Plaintiffs' cause of action" and Petitioners will be able to have a fair hearing on the military contractor defense and the Defense Production Act (50 U.S.C. App. 206 (et seq. (1988), and other issues related to their asserted application of 28 U.S.C. 1442(a)(1), in the Texas state court.

6. Whether, in view of the fact that there are no conflicts in the decisions of the courts of appeal with regard to the real issues pertaining to the availability of appellate review; the underlying merits of this case (whether the district court had removal jurisdiction under 28 U.S.C. (1442(a)(1));

and the erroneous granting of leave to the Petitioners to amend their removal petition to include 1442(a)(1) as a ground for removal, the decision of the Court of Appeals in this case departed "from the accepted and usual course of judicial proceedings", or sanctioned "such a departure by a lower court", that this case is an appropriate one "for an exercise of this Court's power of supervision".

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APPENDIX

Appendix A - Section 1441(c) of Title 28 of the United States Code A1

NO. 92-438

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OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

against,

CHARLES BROWN and JAMES WHITE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF CLARENCE WHITE, DECEASED

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

In accordance with Rules 15 and 24.2 of the Supreme Court Rules, Respondent James White, Individually and as Representative of the Estate of Clarence White (hereinafter, "Respondent White"), hereby adopts Petitioners' list of all parties, as required by Rule 24.1(b); citation of opinions and judgments

delivered in the courts below, as required by Rule 24.1(d); statement of grounds on which the jurisdiction of the Supreme Court is attempted to be invoked by Petitioners, as required by Rule 24.1(e); and the list of relevant statutes and rules, as required by Rule 24.1(f), except that Respondents would add 28 U.S.C. 1441(c) which is quoted in Appendix A, attached hereto.

STATEMENT OF THE CASE

Respondents adopt Petitioners' statement of the case, except for the hereinafter stated additions and modifications.

The Petitioners' statement at p. 4 of their Petition - that "all but two of the thirty-four original Plaintiffs in the present litigation were veterans and their family members (the 'veteran plaintiffs') and thus were not part of the

Agent Orange class" - is simply not correct. M.D.L. 381 included only those veterans who had manifested their injuries at the time of the class settlement. The thirty-two veterans and their family members in the present "litigation" did not manifest any injuries from exposure to Agent Orange until long after the class settlement in M.D.L. 381.

The essence of the appeal filed by the thirty-two veteran plaintiffs, complaining of the District Court's erroneous failure to remand their actions to state court and the erroneous dismissal of their claims, is that they were not a part of the class whose claims were settled in M.D.L. 381.

In any event, the most glaring omission in Petitioners' statement of the case is their failure to mention that they did not attempt to amend their removal

papers to assert 28 U.S.C 1441(a)(1) as a ground for removal until several months after suit had been filed in the state court of Texas. The District Court explained the situation this way:

> "After the civilian actions were commenced as part of the **Ivy** action in Texas state court, defendants removed to federal court. Section 1442(a)(1) of Title 28 was not mentioned in the initial notice of removal. Instead, the removal notices in both the **Hartman** and **Ivy** cases mentioned only "artful pleading," "federal question" and "federal preemption" grounds for removal. See **In re "Agent Orange" Prod. Liab. Litig.**, 781 F.Supp. 902, (E.D.N.Y. 1991). The removal notice did cite **Boyle v. United Technologies Corp**, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), - a case outlining the federal common law military contractor defense - but only to support the "federal preemption" basis for removal. The issue of section 1442(a)(1)'s applicability was not explicitly raised until 1991, when defendants filed their motion for leave to amend their notice of removal under 28 U.S.C. § 1653."

pp. A20, A21 of Petition.

The District Court went on to

conclude that the year-late amendment should be permitted. See A23 -A27. It erroneously based its decision upon the fact that Petitioners had, in the unrelated M.D.L. 381, raised the Defense Production Act issue, strangely somehow extrapolating the M.D.L. 381 proceeding into adequate notice to those civilian plaintiffs, whom the District Court admitted were not a part of that proceeding, of what went on in that proceeding. Id.

Finally, the Petitioners did not make it clear in their Petition what the basis of the District Court's grant of the civilian plaintiffs' motion to remand was. The District Court unquestionably based its decision to remand upon the absence of subject matter jurisdiction. The Court stated:

"The defendants have not met their

> burden of establishing that they were 'person[s] acting under' federal officers within the meaning of section 1442(a)(1). No other basis for federal subject matter jurisdiction having been shown, the actions of Charles Brown and Clarence White are remanded to Texas state court."

A57 of Petition; emphasis added.

I.

THE LAW IS PLAIN AND CLEAR AND THERE IS NO DISPUTE AMONG THE COURTS OF APPEALS THAT 1447(d) ABSOLUTELY PRECLUDES ANY FORM OF APPELLATE REVIEW BY DEFENDANTS WHEN PLAINTIFFS' MOTION TO REMAND HAS BEEN GRANTED FOR ABSENCE OF SUBJECT MATTER JURISDICTION, AS DESCRIBED IN 1447(c).

The Petition for Writ of Certiorari filed by the Petitioners is frivolous and clearly sanctionable. As noted in the Statement of Case above, it cannot be disputed that the civilian plaintiffs' case was remanded because of the absence of subject matter jurisdiction. § 28 U.S.C. 1447(c) states:

> "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

A149.

28 U.S.C. 1447(d) provides:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

A150.

In **Gravitt v. Southwestern Bell Telephone**, 430 U.S. 723, 97 S.Ct. 1439 (1977), a tort action was removed from the Texas state court to federal district court and the district court remanded the case because of what it perceived as absence of federal subject matter jurisdiction. The court of appeals, by mandamus, "ordered the District Court to vacate its remand order because the latter had employed erroneous principles in concluding that it was without jurisdiction".

This Court reversed and forcefully stated in its per curiam opinion:

"The Court of Appeals erred. Title

> 28 U.S.C. §1447(c) provides for remanding a removed action when the district court determines that 'the case was removed improvidently and without jurisdiction'; and when remand has been ordered on these grounds, 28 U.S.C. 1447(d) unmistakably commands that the order 'remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ..' The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise."

97 S.Ct. at 1440; emphasis ours. See also **Thermtron Products, Inc. v. Hermansdorfer**, 423 U.S. 336, 96 S.Ct. 584 (1976) (holding that if a removal is made pursuant to 1447(c)), appellate review by any means is absolutely prohibited by 1447(d) [1] and **Carnegie-Mellon University**

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1 After quoting 1447(d), this Court stated:

> "It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its

v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (holding that, despite some language in **Thermtron** possibly to the contrary, federal district courts have the power to remand on grounds other than those stated in 1447(c) and that the federal district court in that case had the power to remand pendent, state-law claims).

The holdings in **Thermtron** and **Gravitt**, to the effect that no appeal, in any form, is permitted when the dismissal is based upon the absence of subject matter jurisdiction as provided for in 1447(c), have been accepted and fully applied without exception or modification, by every court of appeals decision dealing with the subject. **Krangel v. General Dynamics Corporation**, 968 F.2d 914 (9th

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predecessors stretching back to 1887." 96 S.Ct. at 589.

Cir. 1992) (rejecting an interlocutory appeal in a case where removal had been attempted, as in this case, under 28 U.S.C. 1447(a(1) and the district court had remanded to state court); **Kolibash v. Committee on Legal Ethics of W. VA. Bar**, 872 F.2d 571 (4th Cir. 1989) (after recognizing that 1447(c) remands are not reviewable, allowed review of remand order which "represented a discretionary decision by the district court not to hear a certain case [over which it had subject matter jurisdiction] on grounds of public policy", because the remand was outside the parameters of 1447(c); **Bregman v. Alderman**, 955 F.2d 660 (11th Cir. 1992) (holding that remand order which did not contain an express finding that diversity of citizenship did not exist would still be presumed to be a remand for absence of subject matter jurisdiction and appellate

review of same by way of mandamus was absolutely prohibited);[2] **Matter of Amoco Petroleum Additives Co.**, 964 F.2d 706, 709, 708-710 (7th Cir. 1992) (rejecting review of remand order by way of mandamus; the court held that remands on grounds other than under 1447(c) are reviewable by way of mandamus, but 1447(c) remands are "untouchable"); **Calderon v. Aerovias**

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[2] The Court of Appeals stated:

> "While the court did not make an actual finding regarding whether diversity, in fact, existed, it is clear from the remand order that the court believed that this failure of the pleadings to allege the citizenship of the parties translated into a lack of subject matter jurisdiction. . . .As in **Gravitt**, the district court's conclusion may well have been mistaken and clearly was made without a finding as to diversity of citizenship in fact. However, the Supreme Court in **Gravitt** made it clear that §1447(d) bars review of such remand order even though the district court may have 'employed erroneous principles in concluding that it was without jurisdiction'."

430 U.S. at 723, 97 S.Ct. at 1440.

Nacionales de Colombia, 929 F.2d 599, 601-603 (11th Cir. 1991); **Melahn v. Pennock, Ins., Inc.**, 965 F.2d 1497, (8th Cir. 1992) (acknowledged rule that 1447(c) remands are not subject to appellate review and then held that a remand based on abstention is not a 1447(c) remand and thus such remand was reviewable by way of mandamus); **Corcoran v. Ardra Insurance Co., Ltd**, 842 F.2d 31, 33-35 (2nd Cir. 1988) (after noting that 1447(c) remands are not reviewable by any means, held that remands based on abstention are not within the scope of 1447(c) and could be considered by the appellate court only by way of mandamus); **McDermott International vs. Lloyds Underwriters of London**, 944 F.2d 1199, 1204 (5th Cir. 1991) (holding that "Congress prohibits us from reviewing remand orders based on §1447(c)"); **Karl Koch Erecting Co. v. NY Convention Ctr.**

Dev., 838 F.2d 656, 658, 659 (2nd Cir. 1988) (after concluding that 1447(c) prohibits appellate review where a remand is based upon 1447(c), the Court held that a remand based on a forum-selection clause does not constitute a 1447(c) remand and therefore was reviewable by way of direct appeal); **Tillman v. CSX Transportation, Inc.**, 929 F.2d 1023, 1026, 1027 (5th Cir. 1991) (holding that district court's 0remand order, based on mistaken assumption that it had lost subject matter jurisdiction after adding state agency as a party, was not reviewable by mandamus or otherwise, even if clearly erroneous); [3]

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[3] The Court in Tillman stated:

"Through the prohibitory effect of 28 U.S.C. §1447(d), remand orders under §1447(c) are not reviewable on appeal, by mandamus, or otherwise, except in civil rights cases. . .. In its remand order, the trial court never mentioned §1447(c) . . . . the appellants argue that the failure to cite to § 1447(c)

Survival Systems Division of the Whittaker Corp., et al v. U.S. Dist. Ct. for Southern District of California, 825 F.2d 1416, 1418 (9th Cir. 1987); **Nasuti v. Scannell**, 792 F.2d 264, (1st Cir. 1986) (suit under the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982), removed to federal court; federal district court remanded to state court; Court of Appeals rejected appellate review, holding that 1447(d) applied to the statutory removal under the Federal Drivers Act); **Ochoa**

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places this remand within the small class of cases that fall under the **Thermtron** exception to § 1447(c). . . Although the trial court neither quoted the actual language of § 1447(c) nor cited to the statute, the remand order provided that appellee's 'amendment would destroy subject matter jurisdiction in this court.' This ground comes literally within §1447(c). Thus we are precluded from reviewing the remand order on appeal, by mandamus, or otherwise. See **Merrimack**, 587 F.2d at 647, 648."

928 F.2d at pp. 1026, 1027.

Realty Corp. v. Faria, 815 F.2d 812, 815 (1st Cir. 1987) (held that 1447(d) applies to federal question removals); **First National Bank of Salem v. Wright**, 775 F.2d 245, 246-7 (8th Cir. 1985); **Division of Archives v. Austin**, 729 F.2d 1292 (11th Cir. 1984)[4]; **National City Bank v. Coopers and Lybrand**, 802 F.2d 990, 993 (8th Cir. 1986) (remand of federal question removal not subject to appellate review); **Federal Deposit Insurance Corp. v. Alley**, 820 F.2d 1121 (10th Cir. 1987) (even though remand order did not contain

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4 In rejecting appellate review, the Court noted:

> "Here, the district court judge did not expressly state that he was remanding because of §1447(c); nor, however, did he "state[] openly" that he was remanding on non-1447(c) ground for remand. In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir. 1978).

729 F.2d at p. 1293.

magic words "without jurisdiction", case nevertheless still not subject to appellate review); **Hernandez v. Brakegate, Ltd.**, 942 F.2d 1223 (7th Cir. 1991) (holding that 1447(d) applies to remand of removals "under § 1442 (federal officers), § 1442(a) (members of armed forces), or other statutes authorizing removal."); **In Re Adm'rs of the Tulane Educational Fund**, 954 F.2d 266 (5th Cir. 1992) (will not permit any kind of appellate review with regard to remand orders "predicated on a perceived lack of jurisdiction"); **Soley v. First Nat. Bank of Commerce**, 923 F.2d 406 (5th Cir. 1991)[5]; **In Re Bendectin Litigation**, 857

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[5] The Court explained the Congressional rationale for 1447(d):

> "Although 1447(d) seems fairly harsh, its purpose is to prevent delay through protracted litigation of jurisdictional issues. **Thermtron**, 423 U.S. at 351, 96 S.Ct. at 593. As recently explained by

F.2d 290, 300, 301 (6th Cir. 1988); **Ballard's Service Center, Inc. v. Transue**, 863 F.2d 447 (1st Cir. 1989); **Kunzi v. Pan American World Airways, Inc.**, 833 F.2d 1291 (9th Cir. 1987); **Vatican Shrimp Co., Inc. v. Solis**, 820 F.2d 674 (5th Cir. 1987) cert. den. 108

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the Ninth Circuit:

> 'Congress' concern that parties might use the appeal process to protract litigation over jurisdictional issues and thereby further delay litigation over the merits of the case reflects a balancing of competitive interests resolved in favor of judicial economy. The availability of a federal forum through the removal procedure had to be weighed against the interest of expeditious resolution of a dispute initiated in state court. Congress decided that in cases begun in state court, lengthy delays over jurisdictional issues are unacceptable. Consequently, the district court is the final arbiter of whether it has jurisdiction to hear the case.'
>
> **Pellport Investors v. Budco Quality Theatres**, 741 F.2d 273 (9th Cir. 1984)."

923 F.2d at p. 408.

S.Ct. 345; **Black & Decker (U.S), Inc. v. Brown**, 817 F.2d 13 (3rd Cir. 1987) (remand for absence of jurisdiction not reviewable by mandamus or any other form of appellate review); **New Orleans Public Service, Inc. v. Majoue**, 802 F.2d 166 (5th Cir. 1986) and **In Re Shell Oil Co.**, 966 F.2d 1130, 1133 (7th Cir. 1992).

All of these cases make it clear that **Gravitt** has been consistently read by the courts of appeals to apply a total 1447(d) bar of appellate review of any kind - whether by mandamus, 1292(b) interlocutory appeal or by a **Cohen** collateral order appeal - with respect to 1447(c) remands for absence of subject matter jurisdiction. The Petitioners read all sorts of slants and nuances into the cases, in their desperate effort to portray a conflict among the circuit courts. But, in the final analysis, they

cannot get around the unimpeachable holding by the District Court in this case that the removal was based upon absence of subject matter jurisdiction.

Indeed, **Krangle** is right on point. Removal was effectuated on the basis of 28 U.S.C. 1442(a)(1); the district court remanded after determining that subject matter jurisdiction could not be maintained under that provision; the Court of Appeals stated:

> "Similarly, the district court's concern for the soundness of its decision does not justify creating an exception to section 1447(d). We have recognized that the strong congressional policies behind section 1447(d)'s bar of appellate review preclude review even of patently erroneous district court decisions. See **Hansen v. Blue Cross of California**, 891 F.2d 1384, 1387 (9th Cir. 1989); **Frumenti Development Corp**, 857 F.2d at 671 (petition to appeal remand order under section 1292(b) denied). Accordingly, the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is DENIED."

968 F.2d at p. 916. The Petitioners have

cited no case which conflicts with **Krangel**. Indeed, **Hernandez v. Brakegate**, supra, expressly supports it.

The closest the Petitioners come to creating any kind of conflict is with **National Audubon Society v. Dept. of Water**, 869 F.2d 1196 (9th Cir. 1988) and **In Re TMI Litigation Cases Consol. II**, 940 F.2d 832 (3rd Cir. 1991). In **National Audubon** the Court of Appeals held that it had "jurisdiction to review the remand order" as a 1292(b) appeal. However, the remand involved pendent state law claims. We have already discussed how, under **Cohill**, pendent state law claims may, in the discretion of the district court be remanded, but that such remands, because they are not within the purview of 1447(c), may be subject to appellate review. See 940 F.2d at 1205, 1206.

TMI litigation is a case that really

stands by itself. It proclaims the narrow holding that "1447(d) was not intended to preclude appellate consideration of a section 1292(b) certified question concerning the constitutionality of an Act of Congress" (in that case, the Price-Anderson Amendment Act of 1982), which had been used as the basis for removal. 940 F.2d at 838-848. The Court of Appeals traveled through a tangled web of rationalizations to reach its very strained conclusion.

But **In Re TMI**, aside from reaching a wholly incorrect conclusion, is totally inapplicable to this case for two very important reasons:

(A) The Court concluded that Congress did not intend to include questions of unconstitutionality of removal statutes within the purview of 1447(c) or, alternatively, did not intend,

through 1447(d), to preclude appellate review of such constitutional questions. 940 F.2d at pp. 845-847. Even if the Court were correct in that holding, it is clear that the District Court in this case did not remand because it believed that 1442(a)(1) was unconstitutional. It remanded because it believed that the cases of the civilian plaintiffs and their family members did not come within the purview of 1442(a)(1).

B. **TMI Litigation** expressly pretermitted the question of whether mandamus and/or **Cohen** appeal would be an appropriate vehicle for appeal, 940 F.2d at 848, nte.11, and simply exercised its discretion to accept a 1292(b) appeal. 940 F.2d at p. 848. In this case the Court of Appeals expressly exercised its discretion to reject the 1292(b) appeal certified by the District Court. A1-A3 of Petition.

The cases are legion that, if a court of appeals exercises its discretion to reject a 1292(b) appeal certified by the district court, that is the end of the matter and the appeal is over. **Coopers & Lybrand v. Livesay**, 437 U.S. 463, 98 S.Ct. 2454, 2461 (1978). ("The appellate court may deny the appeal [1292(b) appeal] for any reason, including docket congestion"); **In Re Convertible Rowing Exerciser Litigation**, 903 F.2d 822 (F.Circ. 1990) (holding that the petition for rehearing of an order denying permission to appeal under 1292(b) [entered by the court of appeals] was frivolous; the court of appeals has discretion that is similar to the certiorari discretion of the Supreme Court); **Klinghoffer v. S.N.C. Achille Lauro**, 921 F.2d 21, 24 (2nd Cir. 1990) ("The legislative history of section 1292(b) clearly shows this discretion [of

the court of appeals] encompasses denial of a properly certified appeal . . .for any reason, including docket congestion"); **Parcel Tankers, Inc. v. Formosa Plastics Corp.**, 764 F.2d 1153, 1156 (5th Cir. 1985) (the discretion of the court of appeals in determining whether tc accept an appeal under § 1292(b) is like the discretion of the Supreme Court in passing on a petition for certiorari; this discretion extends to vacating an earlier grant of leave to appeal when it appears to have been improvidently granted"); and **Nuclear Energy Co. v. Scott**, 660 F.2d 241, 245-247 (7th Cir. 1981) cert. den. 102 S.Ct. 1622.

Therefore, it is clear that, even if **TMI Litigation** was correct in its lonely view that 1292(b) overrides the prohibition of an appeal found in 1447(d)

(which it is not)[6], writ of certiorari

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6 The early case of **In Re Bear River Drainage District**, 267 F.2d 849 (10th Cir., 1959) provides an excellent discussion of why the Court in **TMI Litigation** was clearly wrong in concluding that 1292(b) appeals are available with regard to removal orders based upon 1447(c), despite the absolute prohibition contained in 1447(d):

> "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. While the generality of § 1292(b) might seem sufficient to encompass a remand order, it does not expressly either amend or repeal § 1447(d). Repeals by implication are not favored. The intention of Congress to repeal, modify or supersede must be clear and manifest. The earlier statute, § 1292(b), applies generally to 'a civil action' in which 'an order not otherwise appealable under this section' is made. As there is no express repeal or absolute incompatibility, the presumption is that the special statute is intended to remain in force. We are convinced that by the enactment of § 1292(b) Congress did not intend to abandon the long established policy expressed in § 1447(d)."

267 F.2d. at 851. See also **Nasuti v. Scannel**, 792 F.2d at 267, 268 (holding subsequently passed Federal Drivers Act did not create an exception to 1447(d)'s absolute prohibition against appellate

would still be improper in this case because the discretion exercised by the Court of Appeals below, in denying the 1292(b) appeal sought by the Petitioners, is immune from review and unimpeachable.

The Petitioners also argue that, since the District Court ruled that the cases of the military plaintiffs had been properly removed, the terms of 1447(c) and

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review; **Carnegie - Mellon v. Cohill**, (for its discussion of statutory construction, see 108 S.Ct. at 621, 622); **Hernandez v. Brakegate** (holding 1447(d) precludes appellate review of cases removed under 28 U.S.C. 1452; 942 F.2d at 1225, 1226); and **Mitchell v. Carlson** (holding that removals under the Westfall Act, 28 U.S.C. 2671, et seq. does not create an exception to the 1447(d) bar of appellate review; 896 F.2d at 131-134). **Connecticut Nat. Bank v. Germain**, 112 S.Ct. 1146 (1992) is, contrary to Petitioners' contentions, inapposite because it did not involve 1447(d), only 1292(b); § 158 of U.S.C., dealing with Bankruptcy Appeals, did not mention interlocutory appeals (1447(d) is about nothing but interlocutory appeals); and § 158(d) did not contain sweeping words found in 1447(d) such as "on appeal or otherwise."

1447(d) referring to "the case" and "a case" are somehow not applicable to a remand of only a portion of "a case". But this argument overlooks the express terms of 28 U.S.C. 1441(c) which expressly permits remands of only a portion of "a case". There is no doubt that the remand order with respect to civilian plaintiffs is subject to the terms of 1447(c) and 1447(d).

Thus, we point out again, there is no real conflict in the courts of appeal cases construing or applying 1447(d) to cases remanded on the ground of absence of subject matter jurisdiction. Again we say, the Petition filed by the Petitioners is frivolous and the Petitioners should be sanctioned for filing it.

II.

EVEN IF APPELLATE REVIEW WAS PERMISSIBLE IN THIS CASE, THE PETITION STILL SHOULD BE DENIED BECAUSE - WHETHER

APPELLATE REVIEW IS SOUGHT BY WAY OF MANDAMUS, 1292(b) APPEAL, OR COHEN COLLATERAL ORDER APPEAL - THIS CASE DOES NOT QUALIFY UNDER ANY OF THESE THREE METHODS OF APPELLATE REVIEW.

A. MANDAMUS IS ONLY VEHICLE FOR APPELLATE REVIEW OF NON-1447(C) REMAND ORDERS.

At the outset, we note that many courts have expressed or implied the view that "mandamus", not Cohen appeal or 1292(b) interlocutory appeal, is the only appropriate vehicle for seeking appellate review of a non-1447(c) remand order. **Thermtron** seems to make this rule clear, 96.S.Ct at 594[7], and many courts agree. **London v. United States Fire Insurance**

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[7] The Court stated:

"...this Court has declared that because an order remanding a removed action does not represent a final judgment, reviewable by appeal, '(t)he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done'."

96 S.Ct. at 594.

Co., 531 F.2d 257 (5th Cir. 1976);[8] **Corcoran v. Ardra Insurance Co. Ltd.**, 842 F.2d 31, 33-35 (2nd Cir.1988);[9] and

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[8] The Court noted:

> "First, as mentioned above the appellant in this case has taken an improper avenue of review, for the Supreme Court in **Thermtron** specifically held that mandamus rather than direct appeal is the only remedy to require the District Court to entertain the remanded action."

531 F.2d at p. 259.

[9] The Court observed:

> "Nonetheless, **Thermtron**'s explicit ruling that review must be by mandamus rather than appeal has recently been reinforced by **Cohill**, in which the Third Circuit's review by means of mandamus rather than appeal drew no criticism from the Supreme Court, see 108 S.Ct. at 617 & n. 4, in the face of the long established principle that mandamus is not appropriate where a direct appeal would lie, see, e.g. **Helstoski v. Meanor**, 442 U.S. 500, 505-08, 99 S.Ct. 2445, 2447-49, 61 L.Ed.2d 30 (1979); **Ex parte Rowland**, 104 U.S. (14 Otto) 604, 617, 2L.Ed. 861 (1882). Accordingly, we conclude that the remand order at issue in the present case is not appealable and may be reviewed only by petition for mandamus."

New Orleans Public Service, Inc. v. Majoue, 802 F.2d. 166 (5th Cir. 1986).[10] However, a later panel decision of the Fifth Circuit argued that, while mandamus may be the exclusive vehicle for review of non-1447(c) remand order based upon a statute or the discretion of the Court, when the basis is contractual the vehicle for review must be via a **Cohen** collateral order appeal, not by way of mandamus. **McDermott International v. Lloyds Underwriters of London**, 944 F.2d 1199, 1201-1204 (5th Cir. 1991).

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842 F.2d at p. 35.

[10] "The only vehicle for relief from a remand order is the writ of mandamus. A writ of mandamus lies only if the district court has affirmatively stated and relied upon a non-1447(c) ground for remand. **Royal**, 685 F.2d at 126; see also **Gravitt**, 97 S.Ct. at 1439; **In Re Weaver**, 610 F.2d 335, 337 (5th Cir. 1980)' **In Re Merrimack Mutual Fire Ins. Co.**, 587 F.2d 642 (5th Cir. 1978)."

802 F.2d at p. 167.

In any event, since this case does not involve a contractual basis for remand, the authorities are consistent in holding that mandamus would be the only basis for reviewing the District Court's remand order, if by some remote stretch of the imagination the order could be deemed a non-1447(c) order.

B. MANDAMUS.

This Court has outlined the criteria for issuing mandamuses in a number of decisions. See, e.g., **Moses H. Cone Memorial Hospital v. Mercury Const.**, 460 U.S. 1, 103 S.Ct. 74 L.E.2d 765, 927 (1983) and **Will v. Calvert Fire Ins. Co.**,437 U.S. 655, 98 S.Ct. 2552 (1978). Simply stated, the petition- ing party has the burden to "show that his right to the writ (of mandamus) is clear and indisputable." 103 S.Ct. at 938 and 98 S.Ct. at 2557. And this Court has held

that the "clear and indisputable" burden applies to mandamuses sought with regard to jurisdiction. **In Re Chicago R.I. & P. Ry. Co.**, 255 U.S. 273, 41 S.Ct. 288, 289 (1920) ("If the jurisdiction of the lower court is doubtful ... or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record ... or if the complaining party has an adequate remedy by appeal or otherwise ... the writ will ordinarily be denied").

The District Court in this case has made it patently clear that Petitioners cannot possibly meet their heavy burden to show that their right to a mandamus "is clear and indisputable". The Court explained its holding in the following language:

> "Although the case presents a close question, the defendants have not met the requirements of section 1442(a)(1).

> They are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. Although the defendants later produced and delivered Agent Orange under the control of federal officers, these subsequent acts are distinct from the earlier acts of product and manufacturing design being sued upon. The government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking."

A50 of Petitioners' Petition.

The Court then certified the case for interlocutory appeal and in so doing, stated that "there is a .....substantial ground for difference of opinion as to the appropriateness of defendants' attempt to remove under § 1442(a)(1)". See p. A56 of Petition.

Indeed, it is obvious that where there is a substantial ground for

difference of opinion about the controlling legal issues, no party can possibly argue that their right to mandamus is "clear and indisputable". Those two concepts are mutually exclusive.

Moreover, there are other aspects of the issues before the District Court which preclude a finding that Petitioners' right to mandamus is "clear and indisputable".

First, is the District Courts' ruling that the 1447(a)(1) ground for removal was properly before the Court. As we pointed out above, the Petitioners did not assert 1442(a)(1) as a ground for removal in the removal papers they filed within the time requirement for removal and sought to "amend" their removal papers to include 1442(a)(1) over a year after the state court suit was filed. The District Court's decision to permit such "amendment" is highly questionable.

The general rule relative to amendments of "removal petitions" has been well stated by Professor Wright:

> "The petition (for removal) may be amended freely prior to the expiration of the 30-day period for seeking removal. Thereafter, however, the cases indicate that the petition may be amended only to set out more specifically grounds for removal that already have been stated, albeit imperfectly, in the original petition; new grounds may not be added ...."

Wright, Miller and Cooper, Federal Practice & Procedure, § 3733, p. 537, 538; emphasis ours. This statement of law has been quoted and consistently applied by numerous cases from many federal districts and circuits. See **Kelly v. Carr**, 691 F.2d 800, 805 (6th Cir. 1980) (holding that removal petition could not be amended "after the action had been removed" to assert a federal question ground for removal); **Rockwell International v. U.S. Aircraft Ins. Group**, 823 F.2d 302 (9th

Cir. 1987) (the court refused to allow amendment of removal petition after removal in order to add defendant that would have created diversity, the court stating:

> "Second, the proposed amendment is not merely technical like the dismissal of a nonessential nondiverse party. The proposed amendment seeks more than the correction of 'defective allegations of jurisdiction,' a correction permissible under 28 U.S.C. 1653. The proposed amendment is not acceptable."

823 F.2d at 304); **Aetna Casualty & Surety Co. v. Hillman**, 796 F.2d 770, 774 (5th Cir. 1986); **Denton v. Wal-Mart Stores, Inc.**, 733 F.Supp. 340 (D.C. Fla. 1990); **Senter v. Sears, Roebuck & Co.**, 712 F.Supp 179 (D.C. 1989); **Barnhill v. Insurance Co. of N. America**, 130 F.R.D. 46 (D.C. S.Car. 1990); **Myers v. Connell**, 651 F.Supp. 273 (D.C. La. 1986); **Woodlands II v. City Savings & Loan Ass'n**, 703 F.Supp. 604, 607, 608 (D.C. Tex. 1989);

Bellone v. Roxbury Homes, Inc, 748 F.Supp 4344 (D.C. Va. 1990); **Garza v. Midland Nat'l. Ins. Co.**, 256 F.Supp. 12 (D.C. Fla. 1966); **Jacobs v. Director of Internal Revenue Service**, 217 F.Supp. 104 (D.C. N.Y. 1963) (may not amend "to claim different ground for removal"); and **United Gas Pipe Line Co. v. Brown**, 207 F.Supp. 139, 140, 141 (D.C. La. 1962) (new ground for removal not allowed by amendment).

Thus, at bottom the 1442(a)(1) issue should not have been addressed or decided by the District Court and, most certainly, for that reason writ of certiorari in this case is not appropriate.

Second, the District Court's determination that a corporation is a "person" within the meaning of 1442(a)(1) is also highly questionable. The District Court admitted that the federal Courts are heavily divided on the issue:

"The Supreme Court has held that section 1442(a)(1)'s use of the phrase 'person acting under' was not meant to include government agencies. **International Primate Protection League v. Administrators of Tulane Educ. Fund**, _U.S. ___, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991); see also **Mignogna v. Sair Aviation, Inc.**, 937 F.2d 37, 40-41 (2nd Cir. 1991) applying **Primate Protection League**). The Court did not decide, however, whether a corporation could be a 'person acting under [an officer]' **Bakalis v. Crossland Sav. Bank**, 781 F.Supp. 140, 142-43 (E.D.N.Y.1991). Federal courts are divided on the question. Compare **C.H. v. American Red Cross**, 684 F.Supp. 1018, 1023-24 (E.D. Mo.1987) ('person' in 1442(a)(1) refers to natural person") and **Roche v. American Red Cross**, 680 F.Supp. 449, 455 (D. Mass. 1988) (same) and **Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n**, 616 F.Supp. 1504, 1508-10(E.D. Wis. 1985) (same) with **Peterson v. Blue Cross/Blue Shield**, 508 F.2d 55, 58 (5th Cir.) ('person' not limited to natural person), cert. denied, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); **Bakalis**, 781 F.Supp. at 143-33 (same); **Group Health Inc. v. Blue Cross Ass'n**, 587 F.Supp. 887, 890 (S.D.N.Y. 1984) (same)."

A39 of Petitioners' Petition.

Thus, on that issue once again it cannot be said that Petitioners' position is "clear and indisputable".

Finally, the District Court concluded that the issue of whether the Petitioners were "acting under" a federal officer within the meaning of 1442(a)(1) is also a very close one. See A41-A48.

In sum, it is obvious that the contention by Petitioners that they can meet their burden of showing that their right to a mandamus is "clear and indisputable" is a frivolous contention.

C. 1292(B) INTERLOCUTORY APPEAL.

We have discussed above, in connection with our review of **T.M.I Litigation**, supra, how a grant of writ of certiorari cannot be based upon a 1292(b) appeal, because the Court of Appeals in this case exercised its unassailable discretion to reject such appeal.

Moreover, the Court of Appeals' action on the request for certification of a 1292(b) appeal is consistent with the rulings of almost all other courts who have passed upon the question of 1292(b) appeal in connection with remand orders. **Cohill**; **In Re Bear River Drainage District**; **Wright & Miller**; **Federal Practice Procedure** Sect. 3929, p. 135 (1292(b) appeals should be utilized "only in exceptional cases"); **Melahn**; **In Re Oximetrix, Inc.**, 748 F.2d 637 (F.Cir. 1984); **In Re Iowa Mfg. Co. of Cedar Rapids, Iowa**, 747 F.2d 462 (8th Cir. 1984); **Vatican Shrimp Co., Inc. v. Solis**, 820 F.2d 674 (5th Cir. 1987); **Bregman v. Alderman** and **Kunzi v. Pan American World Airways, Inc.**

Finally, we have discussed above how 1292(b) is not even a possible vehicle for appellate review of a remand order,

mandamus being the only possible one. In sum, it is clear that grant of certiorari on the basis of 1292(b) would be entirely inappropriate.

D. COHEN COLLATERAL ORDER APPEAL.

The criteria for a "**Cohen** collateral order appeal" have been set forth in **Coopers & Lybrand v. Livesay**, 437 U.S. 469, 98 S.Ct. 2454 (1978):

> "To come within the 'small class' of decisions excepted from the final-judgment rule by **Cohen**, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment...An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Fed. Rule Civ.Proc. 23(c)(1) Second, the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' **Mercantile Nat'l Bank v. Langdeau**, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523. Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named

> plaintiff or intervening class members. **United Airlines, Inc. v. McDonald**, 432 U.S. 385, 97 S.Ct. 2464, 54 L.Ed.2d 423. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case."

The remand order in this case is somewhat analogous to the class action order in **Coopers & Lybrand** and the situation is very much the same. The remand order is also a collateral order and not a final judgment. There is no question that the issues on the merits of this case's remand/removal matter - involving the Defense Production Act, military contractors' defense, whether the products were purchased off-the-shelf, the nexus between the state cause of action and the role of the federal defenses and the federal officers involved in the contract for, and the use of, the Agent Orange, and a multitude of other

factual and legal issues - "are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action." And finally, while the remand issue becomes somewhat moot after disposition in the state courts, this Court has gone out of its way to reaffirm principles of comity and federalism with regard to state court legal proceedings. **Texaco v. Pennzoil**, 107 S.Ct. 1519 (1987) and **Chick Kam Choo v. Exxon** 108 S.Ct. 1684, 1690, 1691 (1987) (in both of these cases this Court stated that the Texas courts are presumed competent to resolve trials on the merits in cases such as this one, even where federal defenses are involved).

Thus, aside from the absolute prohibition in 1447(d), the Court of Appeals was eminently correct in this case in dismissing the Petitioners' direct appeal and in rejecting their effort to

bring about appellate review of the remand order on the basis of the **Cohen** collateral order doctrine. See also, **Calderon v. Aerovias Nacionales de Colombia**, 929 F.2d 599 (11th Cir. 1991) (dealing with the "matter of substantive law" exception, as it relates to a remand order); **Pelleport Investors v. Budco Quality Theatres**, 741 F.2d 273 (9th Cir. 1984) (discussing how the collateral order doctrine can potentially apply only in non-1447(c) cases and seemingly limiting the **Pelleport** doctrine to contractual cases); **Survival Systems Div. of the Whittaker Corp., et al v. U.S. Dist Ct. For Southern District of California**, 820 F.2d 1416 (9th Cir. 1987) (discussing how pendent claims or claims not independently removable, may, in the discretion of the district court, be remanded, once the federal claim upon which removal is based is gone, and such

discretionary remand is not subject to attack on appeal, either by way of mandamus or of the collateral order rule); **Bregman v. Alderman** (rejecting direct appeal of remand order); **Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev.**, 838 F.2d 656 (2nd Cir. 1988) impliedly limiting collateral order direct appeals vis-a-vis remand orders to those outside 1447(c) and to orders such as those based upon a forum selection clause); **National City Bank v. Coopers and Lybrand**, 802 F.2d 990 (8th Cir. 1986) (again limiting the collateral order doctrine to non-1447(c) matters); **Ochoa Realty Corp. v. Faria**, 815 F.2d 812 (1st Cir. 1987) (rejecting collateral order appeal with respect to remand order); **Black & Decker (U.S.) Inc. v. Brown**, 819 F.2d 13 (3rd Cir. 1987) (rejecting direct appeal) and **Fed. Deposit Ins. Corp. v.**

Alley, 820 F.2d 1121 (10th Cir. 1987) (rejecting direct appeal).

CONCLUSION AND PRAYER

Since the District Court remanded on the basis of absence of subject matter jurisdiction, this is a frivolous appeal. The Petitioners have not, and cannot, avoid the fatal judicial impact of § 1447(d) and **Gravitt v. Southwestern Bell Telephone**.

But even if there were no such thing as 1447(d), for the reasons we have discussed above, appellate review cannot be obtained in this case, whether by way of mandamus, 1292(b) or pursuant to the **Cohen** collateral order doctrine.

In 1897, this Court affirmed the policy, now incorporated into its rules, of limited discretionary review of petitions for writ of certiorari, stating that the "power (to grant certiorari). . .

. will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." **Forsythe v. Hammond**, 166 U.S. 506, 17 S.Ct. 665, 668, 669 (1897).

There is no real conflict among the courts of appeal on the essential issues in this case. In fact, the law is "clear and indisputable" that Petitioners are not entitled to any relief in the appellate courts and that the civilian plaintiffs must be allowed to proceed with their cases in the state court of Texas, without any further frivolous hindrances by the

Petitioners.

Respondent White hereby respectfully prays this Court to deny the Petition for Writ of Certiorari.

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ATTORNEY FOR RESPONDENT

JAMES WHITE, INDIVIDUALLY AND AS RESPRESENTATIVE OF THE ESTATE OF CLARENCE WHITE, DECEASED

APPENDIX A

SECTION 1441(c) OF TITLE 28 OF THE UNITED STATES CODE

Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.